

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

LLOYD TRACHTENBERG,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

) Case No. DISM-00-0035

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair and GERALD L. MORGEN, Vice Chair. The hearing was held in the Superintendent's Conference Room at the Monroe Correctional Complex, Monroe, Washington, on February 7 and 8 and on March 4, 2002.

1.2 **Appearances.** Appellant Lloyd Trachtenberg was present and was represented by Brian Dale, Attorney at Law, of Deno, Millkian, Dale & Davenport, P.L.L.C. Lawrence Paulsen, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of immediate suspension followed by dismissal for neglect of duty, gross misconduct and willful violation of published employing agency policy. Respondent alleges that Appellant engaged in unprofessional behavior toward a coworker and subjected a subordinate employee to sexually offensive behavior.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992); Frederick v. Office of Secretary of State, PAB No. DISM-98-0064 (1999).

## II. FINDINGS OF FACT

2.1 Appellant Lloyd Trachtenberg was a Corrections Mental Health Unit Supervisor and permanent employee for Respondent Department of Corrections. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on April 24, 2001.

2.2 Appellant began his employment as a Corrections Mental Health Counselor (CMH) 2 with the Department of Corrections at the Special Offender Unit (SOU) in May 1997. The SOU houses convicted felons and convicted sexual offenders diagnosed with emotional/behavioral problems. Appellant subsequently promoted to a Washington Management Service position as a Corrections Mental Health Unit (CMHU) Supervisor on Unit B. Appellant had no prior corrective or disciplinary action, he was well liked by his coworkers, and his performance both as a CMH Counselor and as a Unit Supervisor was rated as above average.

2.3 The specific allegations that led to Appellant's dismissal were outlined in a termination letter dated March 28, 2001 from Robert Moore, Superintendent. In summary, Mr. Moore claimed that Appellant 1) exhibited a pattern of unprofessional behavior and hostility toward coworker Kathy Grey by glaring at her during staff meetings, refusing to acknowledge her presence and by

1 misrepresenting her and her unit to other staff and 2) engaged in intentional and unwanted behavior  
2 of a sexual nature toward his subordinate, Sonya DeWitt. The allegations were reported to  
3 management after an unrelated investigation was initiated into a claim made in September 2000 that  
4 Appellant called another female correctional officer a derogatory name.

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6 2.4 During the course of that investigation, Ella Ray Sigmund (now Deacon), Correctional  
7 Program Manager, interviewed Sonya DeWitt, a CMH Counselor under Appellant's supervision  
8 who may have witnessed the incident. Ms. DeWitt was reticent to speak and was vague and  
9 indirect during the investigation. Ms. DeWitt's demeanor alerted Ms. Sigmund to hints of problems  
10 between Appellant and Ms. DeWitt. When asked directly if Appellant was harassing her, Ms.  
11 DeWitt responded no, but indicated there were some problems.

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14 2.5 Between October 30 and November 8, 2000, Appellant went on annual leave. On  
15 October 30, 2000, Ms. Sigmund approached Ms. DeWitt because she appeared stressed and  
16 overburdened with work tasks. Ms. DeWitt had been recently promoted to an Acting CMH  
17 Counselor 3 position and it was the first time she worked on the unit without Appellant's  
18 supervision. Ms. Sigmund made a second visit to Ms. DeWitt that day and told her that she sensed  
19 "there was more going on." She encouraged Ms. DeWitt to be forthcoming with any problems.  
20 Ms. DeWitt was reluctant to speak and she asked if her statement would be kept confidential. Ms.  
21 DeWitt then stated that Appellant had made sexually inappropriate comments to her, and she  
22 indicated that another female employee had experienced "something similar." She told Ms.  
23 Sigmund that the three of them should speak.  
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1 2.6 The individual Ms. DeWitt was referring to was Kathy Grey, a CMH Unit Supervisor.  
2 During a previous conversation with Ms. DeWitt, Ms. Grey had suggested that Appellant had been  
3 inappropriate with her. Ms. DeWitt subsequently approached Ms. Grey about reporting Appellant's  
4 inappropriate behavior. Ms. Grey stated she did not want to be involved, but that she would  
5 cooperate if questioned.  
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7 2.7 On October 31, 2000, Ms. DeWitt and Ms. Grey met with Ms. Sigmund and Associate  
8 Superintendent Carol Grandmontagne to discuss their experiences with Appellant. During the  
9 meeting, Ms. Grey claimed that Appellant exhibited hostile and unfriendly behavior toward her.  
10 Ms. DeWitt claimed Appellant engaged in sexually inappropriate behavior toward her.  
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13 2.8 On November 3, 2000, the institution initiated an Employee Conduct Report against  
14 Appellant and a subsequent investigation was conducted into Ms. Grey's and Ms. DeWitt's  
15 allegations. Throughout the investigation, Appellant denied that he made any inappropriate  
16 remarks to either Ms. Grey or Ms. DeWitt or that he subjected Ms. DeWitt to any behavior of a  
17 sexual nature. Appellant admitted, however, that he used poor judgment as a supervisor when he  
18 shared too much personal information with Ms. DeWitt. When asked what motive Ms. DeWitt  
19 would have to fabricate the allegations, Appellant could provide no plausible explanation other than  
20 his belief that Ms. DeWitt was motivated by financial reasons and by her desire to promote into his  
21 position.  
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24 **Allegations related to Ms. Grey**

25 2.9 Ms. Grey was hired at the SOU as a CMH Counselor 2 in 1998. Ms. Grey did not work in  
26 Appellant's unit, however, she found that Appellant was a good source of help and she occasionally

1 asked him for professional advice on work related issues. In January 2000, Ms. Grey was appointed  
2 to an acting position as a CMH Unit Supervisor. Ms. Grey was subsequently selected to fill the  
3 position on a permanent basis. Ms. Grey noted that following her appointment, Appellant treated  
4 her with hostility, stopped acknowledging her and refused to respond to her greetings. She also  
5 observed that he was dismissive to her during staff meetings, glared at her, rolled his eyes and  
6 sighed loudly whenever she was speaking.

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8 2.10 Ms. Grey perceived that Appellant was “pretty disgusted” with her and on one occasion  
9 misrepresented her to her supervisor, Elaine Herzog, as being “weak and ineffectual” in her ability  
10 to handle a dangerous inmate. Ms. Grey believed that Appellant was attempting to jeopardize her  
11 new supervisory position and her reputation as an employee. Ms. Herzog corroborated that  
12 Appellant’s attitude toward Ms. Grey was dismissive and that he questioned Ms. Grey’s ability to  
13 manage a dangerous inmate because she was fearful of the inmate. Ms. Herzog also witnessed  
14 Appellant rebuff Ms. Grey’s greeting.  
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17 2.11 Ms. Grey attributed Appellant’s behavior to her refusal to accept invitations he extended  
18 from July to December 1998 that they go for walks or meet for drinks after work. Ms. Grey felt  
19 uncomfortable and reported them to Ms. Herzog and to her coworker Chris Glans, who both  
20 recalled Ms. Grey’s discomfort with Appellant’s invitations. Ms. Herzog did not initiate an  
21 Employee Conduct Report against Appellant because Ms. Grey did not feel that Appellant’s  
22 behavior and invitations were sexual in nature. Although outlined in the dismissal letter, these  
23 alleged incidents are not properly before us because they were disclosed to a supervisor in 1998 and  
24 were never investigated. However, Appellant’s behavior toward Ms. Grey in 2000 forms a basis of  
25 this discipline.  
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1 2.12 Appellant denies that he treated Ms. Grey in an unprofessional manner. However, we find  
2 no motive for Ms. Grey to fabricate her story. Ms. Gryn's statements and testimony have been  
3 consistent, and we find her truthful in retelling the events and we find that Appellant treated Ms.  
4 Grey in an unfriendly and unprofessional manner.  
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7 **Allegations related to Ms. DeWitt**  
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9 2.13 Ms. DeWitt was employed as a Social Worker with the Department of Social and Health  
10 Services prior to her appointment as a CMH Counselor 2 in the SOU on June 12, 2000. Appellant  
11 met Ms. DeWitt at a community meeting where he approached her about an employment  
12 opportunity at the Special Offender Unit. Ms. DeWitt and Appellant spoke on numerous occasions  
13 to discuss the position. During their discussions, Ms. DeWitt clearly told Appellant that although  
14 she was interested in the job, she did not want to suffer a loss in pay because her Social Worker  
15 position was at a range 48, while the CMH Counselor 2 position was at a range 45. Ms. DeWitt  
16 also emphasized that her ambition was to promote quickly within DOC. Appellant assured Ms.  
17 DeWitt that he would assist her in the hiring process and to negotiate a higher salary and future  
18 promotions. Ms. DeWitt suffered no loss in pay when she accepted employment in the SOU.  
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21 2.14 Appellant and Ms. DeWitt shared an office alone and Appellant was responsible for  
22 evaluating Ms. DeWitt's work performance. Ms. DeWitt testified that Appellant began to engage in  
23 a pattern of inappropriate behavior toward her shortly after she began her probationary appointment  
24 on June 12. There are no independent witnesses who can corroborate her allegations. In  
25 determining the facts of this case, we have weighed the direct testimony of Appellant and Ms.  
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DeWitt. We find that Ms. DeWitt's retelling of the events has been consistent and forthright and there is no evidence or reason why Ms. DeWitt would fabricate the allegations and no evidence of any malice by Ms. DeWitt toward Appellant. Furthermore, Appellant and Ms. DeWitt worked together unobserved, and there was opportunity for Appellant to engage in the type of behavior described by Ms. DeWitt.

2.15 Ms. DeWitt credibly testified that while many of Appellant's comments were overt, others were subtle and suggestive. Appellant redirected work related conversations on clinical issues concerning inmates and/or sexually deviant behavior to question her about personal sexual matters. Appellant asked Ms. DeWitt questions about her sexual preferences, such as what she liked, and he told her that he was open to "everything." Appellant stared at Ms. DeWitt's breasts, asked whether she was wearing a sports bra and questioned why women wore bras that smashed their breasts. Appellant told Ms. DeWitt that she looked great for her age, that he knew everything about her, dreamed about her and that he wanted his dreams to come true. Appellant told Ms. DeWitt she owed him, that he always got what he wanted, and that he was a good manipulator.

2.16 Appellant extended invitations to Ms. DeWitt to meet with him during off-duty time. Ms. DeWitt declined Appellant's invitations, however, Appellant acted offended and his demeanor toward her changed. Ms. DeWitt felt that Appellant "punished" her by giving her the "silent treatment," avoiding eye contact with her, and by withholding work related information from her. Appellant also reminded Ms. DeWitt that he had not yet completed her probationary performance review. Ms. DeWitt perceived his comment as a threat of a negative performance evaluation.

1 2.17 In June and July 2000, Ms. DeWitt met Appellant and his wife on a total of three occasions.  
2 On the first occasion, they met for drinks and dinner. On the second occasion, Ms. DeWitt again  
3 met Appellant and his wife; after dinner, the three went to Ms. DeWitt's home where Appellant and  
4 his wife assisted Ms. DeWitt with some landscaping. In return, Ms. DeWitt cut Appellant's hair.  
5 On the third occasion, Ms. DeWitt joined Appellant and his wife at a festival where they shared a  
6 pitcher of beer and where Ms. DeWitt danced several songs with Appellant.  
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8 2.18 In September 2000, Appellant's wife left him. Appellant was distressed and he contacted  
9 Ms. DeWitt to discuss his situation. Appellant subsequently stopped making inappropriate  
10 comments to Ms. DeWitt, and she felt his focus was to reconcile with his wife. Ms. DeWitt was  
11 sympathetic to Appellant's marital problems and noting Appellant's disheveled appearance, she  
12 offered to cut his hair again. Ms. DeWitt went to Appellant's home where she and Appellant were  
13 alone. Ms. DeWitt had one or two beers and she cut Appellant's hair.  
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16 2.19 Ms. DeWitt and Appellant exchanged information of a personal nature during both work and  
17 off-duty hours.  
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19 2.20 The Department of Corrections adheres to a policy which allows employees to work in an  
20 environment free from unsolicited, unwelcome, and inappropriate sexual overtones. The  
21 department has adopted and published policies which require employees to maintain high ethical  
22 and professional standards at all times and which prohibit sexual harassment. DOC Policy 853.025  
23 defines sexual harassment as behavior of a sexual nature which is unwelcome and personally  
24 offensive to the recipient of the action. The policy further defines a hostile working environment as  
25 a working situation in which the employee has not suffered any tangible economic loss as a result of  
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1 the alleged harassment but rather the employee has been subjected to a working environment that is  
2 sexually offensive or intimidating to the employee. The DOC Employee Handbook requires that  
3 fellow employees be treated with dignity and respect.

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5 2.21 The policy encourages employees to identify the offensive behavior to the harasser and tell  
6 them to stop or to report the harassment to their supervisor. Employees are encouraged to report the  
7 unwanted behavior to the appointing authority and/or the personnel officer when a supervisor is the  
8 harasser.

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10 2.22 Robert Moore, Superintendent of the Monroe Correctional Complex, was Appellant's  
11 appointing authority when the discipline was imposed. Mr. Moore reviewed the results of the  
12 investigation, he reviewed Appellant's employment history, and he met with Appellant. During  
13 their meeting, Appellant told Mr. Moore that he accepted some responsibility for his actions when  
14 he shared personal information with Ms. DeWitt, that he was influenced by his marital situation and  
15 that he was attending counseling. Mr. Moore also spoke to Ms. Grey and Ms. DeWitt in order to  
16 make a determination of credibility.

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19 2.23 Mr. Moore found the statements made by both Ms. Grey and Ms. DeWitt to be credible, and  
20 he found no reasons for them to be dishonest. Mr. Moore concluded that Appellant engaged in  
21 unprofessional behavior toward Ms. Grey and sexually harassed Ms. DeWitt. Mr. Moore concluded  
22 that Appellant neglected his duty and that his misconduct toward Ms. DeWitt violated the agency's  
23 policy against sexual harassment and rose to the level of gross misconduct. Mr. Moore concluded  
24 that removing Appellant from the workplace was the only way to ensure that Appellant did not  
25 reengage in similar behavior in the future.  
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### III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts that Appellant is not credible and that both Ms. Grey and Ms. DeWitt have been truthful and consistent in telling their stories. Respondent asserts that Appellant subjected Ms. Grey to unprofessional behavior that was corroborated by her supervisor. Respondent argues that Appellant subjected Ms. DeWitt to sexually inappropriate comments in the workplace which were not trivial or isolated. Respondent asserts Ms. DeWitt is a credible witness and that she was unwilling to come forward until encouraged to tell her story. Respondent argues that Appellant violated DOC Policy and neglected his duty. Respondent contends that Appellant's misbehavior rises to the level of gross misconduct and that dismissal is the appropriate sanction because it will protect others from being subjected to similar misconduct.

3.2 Appellant asserts that Respondent is subjecting him to a smear campaign and is charging him with allegations not contained in the disciplinary letter and which are untimely. Appellant argues that Respondent failed to present any credible evidence to carry its burden of proof that he sexually harassed Ms. DeWitt. Appellant argues that Ms. DeWitt solicited and welcomed social contacts with him and his wife which she later claimed were improper. Appellant further argues that the social contact with Ms. DeWitt did not occur due to her gender and that social contact between employees offsite and after work hours occurs regardless of gender. Appellant argues that Ms. DeWitt's work performance was not affected by the events and that while under his supervision, she was promoted and did not suffer any tangible adverse consequences in her employment. Appellant argues that Ms. DeWitt's allegations are not credible, that she is emotionally unstable, that she overreacted to workplace events, misunderstood workplace communication, showed poor judgment, was impulsive and insubordinate. Appellant further

1 contends that Ms. DeWitt solicited sexual favors from other employees in the workplace. Appellant  
2 argues that he should be reinstated.

#### 3 4 IV. CONCLUSIONS OF LAW

5 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
6 herein.

7 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
8 the charges upon which the action was initiated by proving by a preponderance of the credible  
9 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
10 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
11 Corrections, PAB No. D82-084 (1983).  
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14 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
15 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
16 of Social & Health Services, PAB No. D86-119 (1987).  
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18 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
19 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).  
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21 4.5 Willful violation of published employing agency or institution or Personnel Resources  
22 Board rules or regulations is established by facts showing the existence and publication of the rules  
23 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
24 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).  
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1 4.6 Respondent has met its burden of proving by a preponderance of the credible evidence that  
2 Appellant's comments to Ms. DeWitt in the workplace were sexually offensive and inappropriate.  
3 Appellant's misconduct created an intimidating and hostile environment which violated the  
4 agency's sexual harassment policy and constituted gross misconduct. Respondent has also proven  
5 by a preponderance of the credible evidence that Appellant's behavior toward Ms. Grey was  
6 unprofessional and inappropriate in the work place and was a neglect of his duty to treat coworkers  
7 with dignity and respect.  
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10 4.7 In determining whether a sanction imposed is appropriate, consideration must be given to  
11 the facts and circumstances, including the seriousness of the offenses. The penalty should not be  
12 disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence,  
13 to deter others from similar misconduct and to maintain the integrity of the program. Holladay v.  
14 Dep't of Veterans Affairs, PAB No. D91-084 (1992). The appointing authority must impose a  
15 sanction which has the desired effect on the employee, for example, modifying or stopping the  
16 inappropriate behavior, without imposing a sanction which is too severe. The appointing authority  
17 may impose informal corrective action or impose formal discipline for just cause, including  
18 reducing the employee's salary, demotion, suspending or dismissing the employee. Frederick v.  
19 Office of Secretary of State, PAB No. DISM-98-0064 (1999).  
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23 4.7 Ms. DeWitt testified that she did not confront Appellant about his behavior and was  
24 reluctant to come forward to management because she was in the process of completing her  
25 probationary period and she feared retribution from Appellant in the form of a negative  
26 performance evaluation if she complained about his misbehavior. However, Ms. DeWitt's actions

1 when she met Appellant on her own time, especially where she offered to cut his hair and went to  
2 his home alone, contradict the adverse and damaging impact she claims Appellant's comments in  
3 the workplace created for her.

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5 4.8 Nonetheless, Appellant's conduct toward Ms. DeWitt clearly violated the norm of  
6 acceptable conduct in the workplace and should not be tolerated. However, under the  
7 circumstances presented here, we conclude that Appellant's dismissal is too severe a level of  
8 discipline. Appellant had a good record as an employee, had no prior discipline and should be  
9 given an opportunity to correct his behavior. We conclude that a demotion to a position as a  
10 Correctional Mental Health Counselor 2 will impress on Appellant the importance of treating his  
11 coworkers with respect, establishing appropriate boundaries between his personal and professional  
12 life, and his obligation to cease engaging in conversations with his coworkers that are sexually  
13 offensive, suggestive or inappropriate.  
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16 4.11 Therefore, we conclude the disciplinary sanction of immediate suspension followed by  
17 dismissal should be modified to a demotion to a position as a Correctional Mental Health Counselor  
18 2, effective March 28, 2001, which is sufficient to prevent recurrence, to deter others from similar  
19 misconduct and to maintain the integrity of Respondent's program.  
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## 21 **V. ORDER**

22 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Lloyd Trachtenberg is granted  
23 in part, and his immediate suspension followed by dismissal is modified to a demotion to a position  
24 as a Corrections Mental Health Counselor 2, effective March 28, 2001.  
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26 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

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WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair